APPENDIX

In the Supreme Court of the United States

SUPREME COURT, U.S.
FILED
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E. ROBERT SEAVER, CLERK

OCTOBER TERM, 1971

No. 71-81

UNITED STATES OF AMERICA, *Petitioner,*

v.

LOARN ANTHONY BISWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1971
CERTIORARI GRANTED DECEMBER 7, 1971

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LOARN ANTHONY BISWELL

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INDEX

	Page
Relevant docket entries	1
The indictment	3
Defendant's plea of not guilty	6
Defendant's motion to suppress evidence	7
Portions of the hearing on defendant's motion to suppress evidence	8
The court's order denying defendant's motion to suppress	12
Portions of the transcript of the trial	13
Order extending time to file petition for certiorari to July 17, 1971	63
Order granting certiorari *	64

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* Opinion of the court of appeals appears as Appendix A to the petition for certiorari. The judgment of the court of appeals appears as Appendix B.

Relevant Docket Entries

Date 1970	Proceedings
Feb. 20	Filing Commissioner's papers consisting of Complaint, Warrant of Arrest, Order Specifying Methods and Conditions of Release (page 2 only), Appearance Bond in Amount of $20,000 with sureties, Affidavit for Search Warrant, Search Warrant, and Record of Proceedings.
March 2	Indictment returned and filed in open court at Albuquerque.
March 13	Albuquerque/Payne, J./Morrish, Rep. Defendant present and by retained counsel, Mr. Easley, government appearing by Mr. ReVeal. The Court explains the charge, possible penalty, and his rights. Right to trial in Roswell explained.
	ARRAIGNMENT: Plea of NOT GUILTY on Counts 1, 2, 3, 4, 5 and 6. Defendant elects to have trial in Roswell. Trial date not set. Bond continued. Conference of counsel to be had and omnibus report to be filed by March 23, 1970.
	Filing and entering Order Setting Conference of Counsel. Copies mailed to counsel as notice of entry.
April 24	Filing defendant's Motion to Dismiss.
	Filing defendant's Motion to Sever Counts and Elect.
	Filing defendant's Motion to Suppress.
	Albuquerque/Payne, J./Henry, Rep. Defendant is present and by retained counsel, Mr. Easley and Mr. Reynolds, government appearing by

Date 1970	Proceedings
	Mr. ReVeal. Defendant's motions are heard and argued, and following decisions announced: Motion to Suppress denied; Motion to Sever and Elect, Count 6 severed, government to elect which counts will proceed on; government to advise counsel and court by April 27. Motion to Dismiss denied. Counsel to prepare and submit appropriate orders.
May 4	Filing and entering Order denying defendant's motions to dismiss and to suppress, and denying defendant's motion to sever counts and elect, except that Count 6 is severed from the other counts (Payne).
	Notice of entry given to counsel by letter.
May 4	Roswell/Payne, J./Sid Morrish, acting reporter. Case is called for jury trial at 1:35 p.m. Defendant is present and by retained counsel, Mr. Easley and Mr. Reynolds, government appearing by Mr. Watkins and Mr. ReVeal. Jury selected and sworn. FIRST TRIAL DAY. Recess at 4:58 p.m.
May 5	At 9:08 a.m. SECOND TRIAL DAY. Juror Walker is excused because of illness in family and the alternate juror, Mr. Vidlar, takes his place. At 2:55 p.m. the jury retires to deliberate. At 5:37 p.m. the case is concluded with a VERDICT OF GUILTY ON COUNT 1 AND NOT GUILTY on COUNTS 2, 3, 4 and 5. The parties waive polling the Jury, and the Verdict is ordered received and filed. The Jury is discharged until May 25, 1970 at 9:00 a.m. Presentence report ordered. Sentence set May 25, 1970 at 9:00 a.m. at Roswell.
May 25	Roswell, Payne, J./Morrish, acting rep. Defendant present and by retained counsel, Mr. Easley, Government by Mr. Watkins. Allocution. Sentence:
	TWO (2) years imprisonment.
	Right to appeal explained. Defendant states he intends to appeal. Appeal bond set at $5,000.00.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, *Plaintiff*, vs. LOARN ANTHONY BISWELL, *Defendant*.	CRIMINAL No. 23978 26 USC 5861(a) and 5871 Failure to Pay Dealers Tax; 26 USC 5861(d) and 5871 Possession of Sawed-Off Rifle; 26 USC 5861(i) and 5871 Possession of Firearm Without Serial Number; 18 USC 922(m), 923(g) and 924(a) Failure to Maintain Records of Firearms and Ammunition

INDICTMENT

[Filed at Albuquerque, Mar. 2, 1970, E. E. Greeson, *Clerk*]

The Grand Jury charges:

COUNT I

On and before February 4, 1970, at Hobbs, Lea County, New Mexico, and in the District of New Mexico, LOARN ANTHONY BISWELL, defendant herein, wilfully and knowingly engaged in business as a dealer in firearms, as defined by 26 USC 5845, that is to say, he was a person engaged in the business of selling firearms and accepting firearms as collateral for loans without having paid the special (occupational) tax required by 26 USC 5801 for his business.

In violation of 26 USC 5861(a) and 5871.

COUNT II

On or about February 4, 1970, in Hobbs, Lea County, New Mexico, and in the District of New Mexico, LOARN ANTHONY BISWELL, defendant herein, wilfully and knowingly did possess a firearm, as defined by 26 USC 5845(a), to wit, a weapon made from a rifle as modified having an overall length of less than 26 inches and a barrel of less than 16 inches in length, described as a Model X, Iver Johnson, single shot, bolt action, .22 caliber having an overall length of 24¼ inches and a barrel of 11¼ inches in

length, which firearm was not registered to him in the National Firearms Registration and Transfer Record as required by Title II of the Gun Control Act of 1968, Public Law 90-618, 90th Congress.

In violation of 26 USC 5861(d) and 5871.

COUNT III

On or about February 4, 1970, in Hobbs, Lea County, New Mexico, and in the District of New Mexico, LOARN ANTHONY BISWELL, defendant herein, knowingly and unlawfully did possess a firearm, as defined by 26 USC 5845(a), to wit, a rifle having a barrel of less than 16 inches in length, described as a Model 33 Remington, single shot, bolt action, .22 caliber, with a barrel 15¾ inches in length, which firearm was not registered to him in the National Firearms Registration and Transfer Record as required by Title II of the Gun Control Act of 1968, Public Law 90-618, 90th Congress.

In violation of 26 USC 5861(d) and 5871.

COUNT IV

On or about February 4, 1970, in Hobbs, Lea County, New Mexico, and in the District of New Mexico, LOARN ANTHONY BISWELL, defendant herein, knowingly and unlawfully, did possess a firearm, as defined by 26 USC 5845(a), to wit, a weapon made from a rifle as modified having an overall length of less than 26 inches and a barrel of less than 16 inches in length, described as a Model X, Iver Johnson, single shot, bolt action, .22 caliber having an overall length of 24¼ inches and a barrel of 11¾ inches in length, which was not identified by a serial number as required by 26 USC 5842.

In violation of 26 USC 5861(i) and 5871.

COUNT V

On or about February 4, 1970, in Hobbs, Lea County, New Mexico, and in the District of New Mexico, LOARN ANTHONY BISWELL, defendant herein, knowingly and unlawfully, did possess a firearm, as defined by 26 USC 5845(a), to wit, a rifle having a barrel of less than 16 inches in length, described as a Model 33 Remington, single shot, bolt

action, .22 caliber, with a barrel 15¾ inches in length, which was not identified by a serial number as required by 26 USC 5842.

In violation of 26 USC 5861(i) and 5871.

COUNT VI

On or about February 4, 1970, at Hobbs, Lea County, New Mexico, and in the District of New Mexico, LOARN ANTHONY BISWELL, defendant herein, a licensed dealer in firearms, as defined in 18 USC 921, did knowingly and wilfully fail to properly maintain records which he was required to keep pursuant to 18 USC 923 and regulations promulgated thereunder, that is to say, he did fail to maintain records of the receipt, sale, or other disposition of firearms and ammunition at such place, for such period, and in such form as the Secretary of the Treasury has by regulations prescribed.

In violation of 18 USC 922(m), 923(g), and 924(a).

A TRUE BILL

/s/ Lance M. Harvey
Foreman of the Grand Jury

VICTOR R. ORTEGA
United States Attorney

/s/ Ruth C. Streeter
RUTH C. STREETER
Assistant U. S. Attorney

How do you plead as to count one, guilty or not guilty.

MR. BISWELL: Not guilty.

THE COURT: All right. How do you plead as to count two, guilty or not guilty?

MR. BISWELL: Not guilty.

THE COURT: How do you plead to count three, guilty or not guilty?

MR. BISWELL: Not guilty.

THE COURT: How do you plead to count four, guilty or not guilty?

MR. BISWELL: Not guilty.

THE COURT: How do you plead as to count five, guilty or not guilty?

MR. BISWELL: Not guilty.

THE COURT: How do you plead as to count six, guilty or not guilty?

MR. BISWELL: Not guilty.

Motion to Suppress Evidence

[Filed at Albuquerque, Apr. 24, 1970, E. E. Greeson, *Clerk*]

1.

Defendant moves to suppress as evidence the two 22-calibre rifles as described in Counts I, II, III, IV and V and any of defendant's records involving same for the reason that they were obtained by an illegal search and seizure in violation of defendant's rights under the Fourth Amendment to the Constitution of the United States.

2.

Defendant moves to suppress as evidence all guns and records belonging to defendant obtained by the Government under the alleged search warrant dated the 5th day of February, 1970, for the reason that the guns and records were obtained by an unreasonable and illegal search and seizure in violation of defendant's rights under the Fourth Amendment to the Constitution of the United States.

Easley & Reynolds

By Mack Easley
Attorneys for Defendant
Box 638
Hobbs, New Mexico

THE COURT: I will call up United States of America versus Loarn Anthony Biswell.

* * *

THE COURT: You may call your next witness.

MR. EASLEY: If the Court please, that testimony goes to our—well, we can identify it later, but I would like to call Mr. Tom Hupp at this time. If the Court please, to orient the Court, this will have to do with the search and seizure and we will try and keep it——

THE COURT: Okay.

MR. EASLEY: —— brief.

THOMAS HUPP

was called as a witness herein on behalf of the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

By MR. EASLEY:

Q. Will you state your name, please?

A. My name is Thomas Hupp. I am a special investigator with the Alcohol, Tobacco and Firearms Division of the Treasury Department.

Q. And you are stationed——

A. El Paso, Texas.

Q. How long have you been with that department, Mr. Hupp?

A. A little over three years.

Q. Did you make an inspection of Mr. Tony Biswell's place of business in Hobbs, along about February 2nd, or thereabouts?

A. February 4th, 1970.

Q. February 4th. Was that your first trip there?

A. That was my first trip there, yes, sir.

Q. What was the purpose of your visit?

A. Routine compliance investigation in regard to his firearms records.

Q. And did you check with him about the records?

A. I did, sir.

Q. And what did you obtain? State to the Court just what you did, if you will, and what happened there.

A. Upon entering the premises, Your Honor, I identified myself and explained the purpose of the investigation, which was a routine compliance investigation with regard to the firearms records and firearms and ammunition records as regards to the acquisition and disposition of both.

Q. What did Mr. Biswell say to you about his records?

A. Well, I asked him for his firearms records and he produced a book, which did not contain the proper information and it was not in proper form. Also I requested the ammunition record, work acquisition and disposition, and he stated he did not have that and would not have that.

Q. What else was said at that time, if you recall, as far as Mr. Biswell is concerned?

A. Well, I displayed to him a copy and presented him a copy of Commerce and Firearms, Ammunition, Six Twenty-Six, and Gun Control Act of 1968, Six Twenty-Seven, and asked him if he had not received a Commerce of Firearms in the mail and he stated that he probably did, that he had received a lot of things in the mail and didn't have time to fool with them.

Q. Now did you have a search warrant at that time?

A. Negative. I did not.

Q. Was there anything said about a search warrant?

A. When I had finished our explaining the recordkeeping requirements and so forth, at that time I stated to Mr. Biswell that I wanted to check the rest of the premises in regard to the firearms that were on the premises and he stated that he didn't want me to go in the back room. At that time, I displayed to him my—the authorization in the Gun Control Act of 1968, which allows us acquisition and entry into the licensed premises, which includes places of storage. After he read that part, why, he said, "Well, that's what it says so I guess it's okay."

Q. Did he tell you what type of guns he had stored in the back?

A. Yes, sir, he told me he had pawn items and weapons in lay-a-way.

Q. Now, did you go into the back?

A. Yes, sir, I did.

Q. And did you discover anything back there of any interest to you?

A. Yes, sir. Immediately upon going to the back, and

as you go into his storeroom on the right-hand side, there is another door, open doorway, and along that wall which runs east and west, I believe, there was a number of firearms leaning against the wall and foremost in that stack of firearms I noticed a short-barreled rifle.

Q. Now, one or two?

A. I saw the one first and I picked it up and examined it and saw that it was, indeed, a sawed-off rifle and at that time I advised Mr. Biswell of his rights as listed in document fifty-six sixty-one.

Q. Where did you locate the other short-barrel rifle?

A. It was in close proximity to that. I believe along that same stack, sir.

Q. State to the Court whether or not they were in plain view there as you walked into the room?

A. Not as you walked directly into the storeroom, but when you walk into that portion, you walk back into the storeroom and then turn right through the open doorway and they were in plain sight, right.

Q. They were stacked right along with all of the other guns against the wall?

A. You bet they were.

Q. Now after you—what did you do after that? Did you go ahead and check his records, the balance of his records?

A. Well, he didn't have any records.

Q. How long were you in there?

A. Approximately an hour and fifty minutes. I believe I arrived about three-ten p.m. and departed about five p.m.

Q. And did you take those two short-barrel rifles?

A. I did.

Q. When did you arrest Mr. Biswell?

A. I arrested Mr. Biswell about ten twenty-five a.m. on February 5th.

Q. That was the next day after you made this investigation?

A. That's correct.

Q. You later obtained a search warrant as to the other guns that were seized?

A. I did.

Q. And when did you search the premises and seize those guns?

A. We arrived on the premises at approximately five-twenty p.m. on February 5th and departed at two-twenty a.m. February 6th.

MR. EASLEY: I believe that's all, if the Court please.
THE COURT: All right, you may cross examine.
MR. REVEAL: We have no questions.

ORDER

[Filed at Roswell, May 4, 1970, E. E. Greeson, *Clerk*]

The motions of defendant came on for hearing in open court on April 24, 1970, the defendant appearing in person and by his attorneys, Mack Easley and Warren F. Reynolds, and the United States of America appearing by its attorneys, Victor R. Ortega, United States Attorney, and Stephen L. ReVeal and Michael P. Watkins, Assistant United States Attorneys, the Court having heard the evidence and the arguments of counsel, and the Court being fully advised in the premises, it is therefore

ORDERED that defendant's motion to dismiss be, and it hereby is denied.

IT IS FURTHER ORDERED that defendant's motion to suppress evidence be, and it hereby is, denied.

IT IS FURTHER ORDERED that defendant's motion to sever counts and elect be, and it hereby is denied, excepting that Count 6 of the indictment herein be, and it hereby is severed for trial from the other counts of the indictment and a separate trial shall be held on Count 6 of the indictment and a separate trial shall be had on all the remaining counts of the indictment. Trial on counts 1, 2, 3, 4, and 5 of the indictment will be had in Roswell, New Mexico, on May 4, 1970, at 9:00 a.m. A setting of the trial on Count 6 of the indictment will be made in the future.

/s/ H. Vearle Payne
United States District Judge

APPROVED:

/s/ Stephen L. ReVeal
STEPHEN L. REVEAL
Assistant U. S. Attorney

/s/ Mack Easley
Attorney for Defendant

[63] WILBUR SNYDER

was called as a witness herein on behalf of the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

[67] Q. (Mr. ReVeal continuing.) During the course of your knowing Mr. Biswell, have you ever conducted any pawn business with him?

A. Yes, sir.

Q. In particular, have you ever pawned any firearms?

A. Yes, sir.

Q. I will hand you what has been marked as Plaintiff's Exhibit Number One, and ask you if you have ever seen that before?

A. Yes.

Q. And where have you seen that exhibit before?

A. I pawned it.

Q. You pawned that to Tony?

A. Yes, sir.

Q. Is that your weapon or was that your weapon when you pawned it?

A. Yes, sir.

Q. When did you pawn that to Mr. Biswell?

A. Approximately in February.

Q. Of this year?

[68] A. Yes, sir.

Q. Do you recall approximately how much you received?

A. I think about three dollars.

Q. And you pawned it? Where did you pawn this?

A. At Tony's Pawn and Loans.

Q. In Hobbs, New Mexico?

A. Yes.

Q. And with whom were you dealing?

A. Tony.

Q. Mr. Biswell, himself?

A. Yes, sir.

Q. Did you have any conversation with Mr. Biswell at that time about the particular weapon at the time you pawned it?

A. No, sir.

Q. Is that in essentially the same condition today that it was when you pawned it?

A. Yes, sir.

Q. Same length, to the best of your knowledge?

A. Yes, sir.

Q. Was it that length when it came into your possession?

A. Yes, sir.

[69] Q. About what time of day was it that you pawned it to Mr. Biswell?

A. It was close, as I can remember, it was about seven o'clock in the evening. He was getting ready to close up.

Q. When you went in, was the store open?

A. Pardon me?

Q. Was—when you went into the shop, was the store open?

A. Yes, sir.

Q. Was anyone in there besides you and Mr. Biswell?

A. Yes, sir.

Q. Where—were these customers or were they other employees?

A. Some of both, most of them were customers.

Q. I will hand you what has been marked as Plaintiff's Exhibit Two and ask if you have ever seen this before?

A. Yes, sir.

Q. Where have you seen that before?

A. That is the receipt that Tony gave me for the rifle when I pawned it.

Q. Is that the receipt that Tony Biswell gave you for that rifle, is that correct?

* * * *

[71] CROSS EXAMINATION

By MR. EASLEY:

Q. Mr. Snyder, was this the first time that you pawned any guns with Tony?

A. No, sir.

Q. Do you have a collection of guns, yourself?

A. Yes, sir.

Q. How many guns do you have?

A. I believe I have four now.

Q. Four?

A. Un-huh.

Q. Are any of those other guns short weapons, have sawed-off barrels?

A. No, sir.

Q. How many times would you say that you dealt with Tony as far as pawning those guns is concerned? That is, in the past two and a half years.

A. Probably a half a dozen or a dozen times.

[72] Q. And does he have all of the rest of your guns at this time under pawn?

A. All but one.

Q. And when did you get it out?

A. Day before yesterday, I believe it was.

Q. Where did you get this gun, if you know?

MR. REVEAL: Your Honor, we will object to this as being irrelevant to the issues of this case.

THE COURT: Yes, what is the purpose of this, counselor?

MR. EASLEY: If the Court please, I guess I can withdraw and accede to the objection.

THE COURT: All right.

Q. (Mr. Easley continuing.) When you normally go in to pawn your guns, are there usually a lot of people around there?

A. Yes, sir.

Q. Usually there are several people around the counter talking with Tony and working with him on pawns for sale?

A. Yes, sir.

Q. And on this particular occasion when you walked in with this gun, or rifle, you were saying there were several people in there. Would you care to estimate for the jury how many?

[73] A. Well, I would imagine a half a dozen people.

Q. Were they up around the counter?

A. Some of them, yes.

Q. Now, you have dealt with Tony before on these pawns, when you brought this gun up to him and told him that you wanted to pawn it, did he deal any different as far as this gun was concerned that he did with the others?

A. No, sir.

Q. Did he attempt to sneak around behind the counter in order to hide it or anything?

A. No, sir.

Q. Did he say anything to you about this is an illegal gun? Or that he couldn't take it?

A. No, sir.

Q. He just made out the pawn ticket and handed you the money like he normally does?

A. Yes, sir.

Q. Now, when did you decide to go back for the gun, if you did?

A. Well, I was planning on going back to get it the following payday.

Q. And did you have a chance to get it?

A. No, sir.

Q. Was the time of the pawn up?

A. No, sir.

[74] Q. For what length of time was it pawned?

A. I don't remember for sure, but it wasn't very long.

Q. I am wondering as far as the pawn ticket, was it pawned for thirty days or sixty days or what? What was the period of time for which you put it in there?

A. It was pawned for thirty days.

Q. But that thirty days had not elapsed at the time that the gun was seized?

A. No, sir.

MR. EASLEY: No more questions.

MR. REVEAL: No redirect, Your Honor.

THE COURT: All right, you may step down.

(THEREUPON, the witness was excused.)

THE COURT: Now, don't discuss your testimony with anyone else.

MR. REVEAL: Call Ralph Sias.

RALPH SIAS

was called as a witness herein on behalf of the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

[76] Q. And how did you come to know Mr. Biswell?

A. He is the owner of the pawn shop.

Q. Would that be Tony's Pawn and Loans?

A. Yes, sir.

Q. Have you ever pawned any material, any items, through Mr. Biswell?

A. Yes.

Q. On about how many occasions?

A. About three.

Q. Have you even pawned any firearms to Mr. Biswell?
[77] A. Yes, sir, I mean I haven't pawned any, I didn't pawn any, just that gun over there.

Q. Let me hand you what has been marked Plaintiff's Exhibit Number Three and ask you if you have ever seen that before?

Would you point that up in the air, please? It is unloaded, but keep it up anyway.

A. Yes, sir.

Q. Where have you seen that before, Mr. Sias?

A. I pawned it.

Q. And to whom did you pawn it?

A. Tony.

Q. Do you recall about when that was?

A. It was around December or January.

Q. And would that be December of 1969 or January of 1970?

A. Uh-huh.

Q. Can you be any more specific than that, get a closer date than that for us?

A. No, sir.

Q. Do you recall at about what time of day this was?

A. Oh, it was about three o'clock.

Q. Would that be in the afternoon or in the morning.
[78] A. In the afternoon.

Q. And where did you pawn it?

A. Over at Tonys.

Q. Was it at his home or pawn shop?

A. At the pawn shop.

Q. When you went into the pawn shop, was there anybody else there?

A. I don't remember.

Q. Now, who did you deal with when you went in there?

A. Tony.

Q. Mr. Biswell, himself?

A. Yes.

Q. Did you discuss that weapon with him at all at the time you pawned it?

A. No, I didn't.

Q. Do you recall how much you got for it?

A. Three dollars.

Q. Do you recall seeing anybody else in the store besides yourself and Mr. Biswell?

A. Just the employees were there.

Q. Do you recall seeing any customers there?

A. No, I don't remember.

Q. Was the store open at that time when you went in there?

[79] A. Yes.

Q. It wasn't on a Sunday or anything like that?

A. No, it was during the week.

Q. Now, take a good look at that rifle, Mr. Sias. Is that in essentially the same condition today as it was the day you pawned it?

A. I don't remember if it is or isn't.

Q. Well, does it look like it has been altered in any fashion?

A. No.

* * * * *

Q. (Mr. ReVeal continuing.) Mr. Sias, did you ever redeem this from the pawn shop?

A. Sir?

Q. Did you ever get it back?

A. No, sir.

Q. Did you ever pay off the pawn?

A. No, sir.

[80] Q. How long did you pawn it for?

A. It was around a month. And I went over there to get it and they said the gun was already gone, that both—all of this gun was gone and that is the reason I didn't get it out.

* * * *

CROSS EXAMINATION

By MR. EASLEY:

Q. Mr. Sias, what did you pay for that gun?

A. Three dollars—I mean two-fifty.

Q. And Tony gave you three dollars on the pawn?

A. Yes.

Q. You say that it was about three o'clock in the afternoon when you went in his place of business. Do you recall if there were any customers in there at the time.

A. No, I didn't look around. I just saw the employees that worked there.

Q. Are you in his place quite often?

A. Yes.

Q. Are you aware that he keeps his place open [81] from eight in the morning until seven in the night?

A. Yes.

Q. How often do you go in there?

A. I don't go in very often, just once in a while.

Q. Do you go in and buy things there at Tonys?

A. Yeah, I bought a radio from him.

Q. Normally, when you are in there, are there a lot of customers around?

A. Yes.

Q. Now, I believe you stated that you went over to pick up the gun. Did you intend to take it out of pawn and it had been seized?

A. Yeah.

MR. EASLEY: That's all.

* * * *

[82] RECROSS EXAMINATION

By MR. EASLEY:

Q. Mr. Sias, you didn't know that that gun was an illegal gun, did you?

A. No, sir.

Q. At the time you went in and showed it to Tony, did he say anything about it being illegal?

A. No, sir.

Q. Did he attempt to conceal it in any way?

A. No, sir.

Q. Did he handle that gun like the way that he handles other pawns that you had made there?

A. Yes, sir.

[83] THOMAS G. HUPP

was called as a witness herein on behalf of the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

[84] Q. And by whom are you employed?

A. Alcohol, Tobacco and Firearms Division of the U.S. Treasury Department, Internal Revenue.

Q. And where do you live?

A. El Paso, Texas.

Q. Is part of the area that you cover in your capacity of the Alcohol, Tobacco and Firearms Division, did it encompass the county?

A. Yes, it does.

Q. That is Lea County, New Mexico?

A. Yes, sir.

Q. What actually is your position with the division?

A. I am a special investigator.

Q. And as such, what are your duties?

A. I am responsible for enforcing internal revenue codes and laws pertaining to the Alcohol, Tobacco and Firearms as spelled out in the Gun Control Act of 1968.

Q. Did you have occasion on February 4, 1970, to come to Hobbs, New Mexico?

A. Yes, I did.

Q. What was the purpose of your visit to Hobbs?

A. A routine compliance investigation of firearms [85] dealers.

Q. Did you on that day, did you have occasion to go to Mr. Biswell's place of business?

A. Yes, sir.

Q. And where is that located?

A. On West Marlin Street, Hobbs, New Mexico.

Q. Do you recall the name of the place of business?

A. Tonys Pawn and Loans.

Q. About what time of day did you go there?

A. About three-ten p.m.

Q. Did you go by yourself?

A. No, sir, I was accompanied by Mr. Bill Fowler of the Hobbs Police Department.

Q. And what was your purpose of going to Mr. Biswell's place of business?

A. To conduct a routine compliance investigation.

Q. What happened after you arrived there?

A. After identifying myself to Mr. Biswell, and explaining certain requirements, I discovered two illegal firearms on the premises.

* * * * *

[86] Q. (Mr. ReVeal continuing.) When you went into Mr. Biswell's place of business with Mr. Fowler, were there other people there as well as Mr. Biswell?

A. Yes, sir, there were.

Q. What is your best estimate of the number of people that were there?

A. Oh, from five to ten.

Q. Did it vary in the time that you were there?

A. Yes, sir, it did.

Q. How long did you stay there?

A. Approximately an hour and fifty minutes.

Q. And during the time you were in that place of business, were you conversing with Mr. Biswell the entire time?

A. No, I wasn't. I attempted to converse with Mr. Biswell, but he would interrupt our conversation to wait on customers.

Q. How often did this happen?

A. Numerous times.

Q. Well, did you spend more time talking to him or waiting for him?

A. More time waiting.

Q. Now, I believe you said you found a couple of rifles there? How did you happen to come across these [87] rifles

A. I was checking the stock to see if there were any illegal firearms there.

Q. Where did you go to check his stock?

A. The storerooms.

Q. Was this part of this same building that the store was in?

A. Yes, sir, it is.

Q. And which store would you go into when you found the rifles in question?

A. The building is split up primarily into four rooms. The front of the building is one long room. And directly north of the east part of the building, there is a storeroom, and you enter it from the storeroom that borders on the west part of the building.

As you enter that doorway there is an open doorway to the right which gives you access to the storeroom directly behind the front east part of the building. And the firearms were leaning against the wall of that storeroom.

Q. And were the contents of this room identified to you?

A. Yes, they were.

Q. And by whom were they identified to you?

A. By Mr. Biswell.

[88] Q. And, Tom, what did he say about the contents of this room?

A. He said that the firearms and weapons were on pawn.

Q. I will hand you Plaintiff's Exhibit Number One, and ask if you have ever seen this before?

A. Yes, sir, I have.

Q. And where did you see that before?

A. In the storeroom that I described as the premises of Tonys Pawn and Loans.

Q. How did you come to find that particular weapon?

A. This was about the first firearm that I noticed there, standing out by its obviously illegal status.

Q. What do you mean by that?

A. Well, sir, obviously it has a barrel of less than sixteen inches and the overall length is obviously less than twenty-six.

Q. Twenty-six inches?

A. Yes, sir.

Q. Did you measure that barrel and rifle?

A. Yes, I did.

Q. When did you do that?

A. Upon spotting the weapon, I picked it up and measured the barrel.

[89] Q. And what is the length of the barrel of that weapon?

A. Eleven and three-quarter inches.

Q. What is the length of the entire weapon?

A. Twenty-four and one-quarter inches.

Q. Now, is that rifle essentially in the same condition today as when you saw it at the store?

A. Yes, it is. The bolt was in place on the weapon, and, of course, it didn't have no evidence tag.

Q. When was the evidence tag placed on it?

A. After I had removed it from the premises.

Q. On the same day?

A. Yes, sir.

Q. Have you had occasion to attempt to fire that weapon?

A. Yes, sir, I test-fired this weapon that afternoon.

Q. And where was that accomplished?

A. At Hobbs, New Mexico.

Q. And what was the result?

A. I found it to be fully operable.

Q. How do you test it?

A. I fired it.

Q. Put a shell into it and fired it?

A. Yes, I did.

[90] Q. And it functioned properly?

A. Yes, it did.

Q. Now, I will hand you Plaintiff's Exhibit Three and ask you if you have ever seen that before?

A. Yes, I have.

Q. And where did you see that?

A. At the premises of Tonys Pawn and Loans.

Q. And where was it at when you saw it there?

A. It was leaning against the same wall in the general vicinity of the first firearm.

Q. And when did you see it there?

A. Shortly after discovering the first weapon.

Q. It would have been the same day?

A. Yes, sir.

Q. About the same time?

A. Yes, within minutes.

Q. Have you had occasion to measure the barrel on this weapon?

A. Yes, I measured the barrel on the weapon.

Q. And what is the length of the barrel of the weapon?

A. Fifteen and three-quarters inches.

Q. Now, Mr. Hupp, how do you measure the barrel of a weapon?

A. From the face of the bolt to the end of the [91] barrel.

Q. This is the method you used when you measured these?

A. No, sir, I couldn't find—or didn't have with me a cleaning rod. So, I had to sight along here (indicating) and I am sure that I am accurate within a millimeter of the length of the barrel.

I had to place the tape at the end of the barrel and bring it down here (indicating) where you can see that the face of the chamber comes very close to the end of the front part of the receiver.

Q. Now, was that rifle in essentially the same condition today as it was when you saw it at Tonys Pawn and Loans?

A. Yes, sir, except for the removal of the bolt.

Q. Was the bolt in or out?

A. The bolt was in the weapon.

Q. Did you have occasion to test-fire that weapon?

A. Yes, sir, I did.

Q. And when did you do that?

A. At the same time or the same afternoon that I test-fired the first weapon, on February 4th.

Q. And how did you test it?

[92] A. By firing it, placing a .22 caliber cartridge in and firing it.

Q. Did it function properly?

A. Yes, it did.

Q. Did you, while you were at Mr. Biswell's place of business, ask him if he had a dealer's license for the National Firearm's Act, for weapons?

A. Yes, I did.

Q. What was his response then to that?

A. He said that he did not.

Q. That he what?

A. Did not.

Q. Did he make any effort to locate a license at his place of business, a license for a National Firearms Act, for weapons, such as the one you have in your hand?

A. Well, I looked for a license when I first entered and I had to ask Mr. Biswell for the Federal Firearms license. He did not have it prominently displayed.

Q. What is the difference between the Federal Firearms license and the National Firearms Act license?

A. The Federal Firearms license is a license that all dealers must have in order to sell legal weapons, as we all know them. Generally, a sporting weapon, shotguns, rifles, and all legal barrel lengths, and also ammunition.

[93] National Firearms Act license costs considerably more. It costs two hundred dollars a year and is for dealers of sawed-off shotguns, and rifles having barrels less than sixteen inches, and machine guns, and gangster-type weapons.

Q. Well, now, while you were there at Mr. Biswell's place of business, did you discuss the requirements of the law and the regulations with respect to these weapons?

A. I did.

Q. Did you give him any copies of these regulations and statutes?

A. I gave Mr. Biswell a copy of the Gun Control Act of 1968, which is a Publication 627, which has all of the firearm laws of the Gun Control Act of 1968 there in them.

Q. Did you have occasion to return to Mr. Biswell's place of business the following day?

A. Yes, I did.

Q. On—going back to the first day—before did you give him a copy of these regulations that day?

A. Yes, I did.

Q. And a copy of the statutes as well?

A. Yes, I did.

Q. When you returned to Mr. Biswell's place of [94] business on the fifth of February, about what time of day was that?

A. It was about five-twenty p.m.

Q. Did you, at that time, see the document which you had given to Mr. Biswell on the fourth?

A. Yes, I did.

Q. Did you see any other copies of the rules and regulations or statutes with regard to the National Firearms, weapons at that place of business, in addition to the ones you gave him?

A. I saw a copy of Publication 626, Commerce, Firearms, and Ammunition, that was on the premises, other than the ones I had given him.

Q. And what is document 626, what are you talking about there?

A. It is a booklet describing to the dealers what is required and how to keep their records under the Federal Firearms Act.

Q. Did you see these two weapons there that we are talking about on the fourth?

A. Yes, I did, on the fourth.

Q. Did you discuss with Mr. Biswell at all the status of those two weapons, Plaintiff's Exhibit One and Three?

A. Yes, I did.

[95] Q. Why did you do that?

A. Immediately upon spotting the first firearm, after seeing it was an illegal weapon, I then asked Mr. Biswell if it was registered.

Q. What do you mean "was it registered?"

A. Well, gangster type weapons have to be registered

with the National Firearms Registration and Transfer Record for this type of weapon.

Mr. Biswell stated it wasn't.

Q. I am sorry. I missed your last words.

A. Mr. Biswell stated that it was not registered as far as he knew, I believe was his statement.

Q. Now, did you have occasion to discuss the second weapon, I believe that is Plaintiff's Exhibit Three, the second one you found?

A. Yes, I did.

Q. And when did that discussion with Mr. Biswell take place?

A. Shortly after, within minutes, of the first discussion.

Q. Right after you found it?

A. Yes, sir.

Q. What was that discussion?

A. Essentially the same. I advised him that this was also an illegal weapon. It fell into the same [96] category as the first. And that it would also be seized.

Q. Did you ask him whether it had been registered?

A. Yes, I did.

Q. What was his response to that?

A. He said as far as he knew, it was not registered.

MR. RE VEAL: That's all, your witness.

CROSS EXAMINATION

Q. What territory does your district encompass at this time?

[97] A. The seven southern counties of New Mexico and the nineteen western counties of Texas.

Q. How many agents do you have there to work with you?

A. One other agent.

Q. How many dealers do you have in these counties, if you recall?

A. I don't recall the exact number. We are getting more dealers all the time. It approaches fifteen hundred.

Q. Now, about how often do you get around to seeing these dealers, or some agent?

A. We try to contact each dealer once a year.

Q. Have you ever been in Tony Biswell's place of business before?

A. No, I hadn't.

* * * * *

[98] Q. (Mr. Easley continuing.) Now, you are saying there are two different types of guns, the regular ones that are legal to be sold, and then the gangster-type guns, you called them. Now, are these the gangster-type guns you are talking about here?

A. Well, sir, I didn't determine it was a gangster-type weapon, Congress determined the gangster-type weapons. It falls in that category.

Q. And in order to get a license to handle these, it would be necessary that the dealer pay an additional license fee of how much?

A. Of two hundred dollars a year.

Q. Is it also necessary for them to pay two hundred dollars every time one of these guns is transferred?

A. Now, it is. It is incumbent upon the transferrer to pay a two-hundred-dollar tax with each firearm.

Q. In other words, now, when Mr. Snyder brought that short gun in there, he was held under the law to pay [99] two hundred dollars just to transfer this to Tony Biswell on a pawn?

A. If one individual transfers this type of weapon to another, it is incumbent upon the transferrer to pay the tax.

* * * *

Q. Now, you say these are—you referred to them as gangster-type weapons. Aren't these types of .22's [100] in your experience, sometimes sawed-off so that it's—so that kids can use them to shoot with?

A. In my experience, no, sir.

Q. Now, you say that you were in Hobbs to make a routine compliance check of these dealers in our city there, you checked several of these dealers before you went to Tony's Pawn Shop, did you not?

A. Not several.

Q. How many would you say?

A. One other dealer that day.

Q. And you were checking to see whether or not he was entitled to have his license renewed?

A. Would you—

Q. One of the purposes was to—for his license renewal?

A. Well, when we contact a dealer, we have three forms to fill out, 4314, 15, 16, 17.

The 4317 has to do with renewal of licenses. We have background investigations to make, to make sure that none of these people have ever had any problems, convictions, and so forth.

Q. Now, did you at that time, after you had been there a while, look at some of his guns out in front, you told him you wanted to go back in the storage room?

[101] A. That's right.

Q. And at that time, he told you that those guns in the storage room were pawned guns?

A. No. When we went back into the storage room, he indicated a group of firearms that he told me were on lay-a-way and had certain amounts of money paid on them. And that the other firearms, I believe, in two different places, were pawned items.

Q. But, isn't it true, Mr. Hupp, that he told you before you went back into the back room that he had the pawned guns stored there?

A. I don't recall if he told me that before we went back there or not.

[101] Q. Did he ask you if you had a search warrant?

A. Yes, he did.

Q. And what was your response to that?

A. I said, "No, I didn't have a search warrant." And that the license premises is open to inspection during normal business hours.

Q. And what then was his response?

A. He asked to see the section of the law. And I showed it to him. And he said, "Well, that is what the law says," and so he said okay.

Q. So you walked back into the storage room and isn't there a sign on the door going back into that [102] back storage place, "No admittance, employees only"?

Do you recall?

A. Yes, I believe there is such a sign.

• • • •

[103] Q. And where, when you walked into that room, did you see that short gun?

A. Approximately in this area (indicating).

Q. It was inside of the door where these guns are indicated here?

A. That is correct.

Q. And I believe you stated that that was the first weapon that caught your view when you stepped in there?

A. No, I didn't say the first weapon that caught my view. I said that it stood out in an obvious illegal capacity.

Q. It wasn't covered up in any way?

A. Not at—not that I can recall.

[104] Q. It wasn't concealed or wrapped up in any manner that you couldn't immediately see it?

A. No, it was obvious.

Q. Now, where was the other gun you are talking about?

A. It was in the same line, general area, as the first.

Q. Right close to it?

A. Close by it, close proximity to the first one.

Q. And now, you say the minute you saw that, you picked it up and looked at it?

A. That is correct.

* * * *

Q. And what else occurred at that time?

A. Well, I asked him, as I stated prior to this, if the firearms were registered, or the first firearm was registered.

Q. And then you went down and located the other firearm and went through the same routine?

A. No, I didn't advise Mr. Biswell of his rights [105] on the second firearm. I had already advised him of his rights.

Q. But you say, "Now, do you have this gun registered with the National Firearms Registration and Transfer Record?"

A. I asked him if the firearm was registered to him. And he said that as far as he knew it wasn't, that he didn't know anything about the registration procedures.

I explained to him that we had had an amnesty period in November of 1968, whereby anybody possessing any types of these weapons could have them registered with no possibility of criminal prosecution.

Q. That amnesty period is over now, is it not?

A. It is.

Q. So any person who possesses firearms such as that is guilty under the Act?

A. Mere possession constitutes, or is the charge.

Q. Now, when you picked these guns up, you told him you were seizing them?

A. I advised him of their illegal status and told him that they would be seized.

Q. And you didn't have any intention of leaving them there, I would judge?

[106] A. No, I didn't.

Q. And he had asked you—if he would have said to you, "Now, these guns are pawned and belong to someone else, and not to us, and I don't want you to take them," you would have taken them anyway?

A. Yes, I would have.

[106] Q. Did you ask him who these belonged to?

A. Yes, I did. On the shortest firearm, he looked up and presented a pawn slip with the name of Wilbur Snyder.

And on the second firearm, he couldn't come up with a pawn slip. He stated—he also stated that he couldn't read this name on here. And there is a name on this piece of paper which was on the firearm at that time. And the name of Ralph Sias can barely be made out.

And I believe at that time, if my memory serves me, Detective Fowler looked at this name and asked him if it was Ralph Sias. And if my memory serves me, I believe Mr. Biswell said, "Yes", that was correct. He believed it was Ralph Sias.

Q. And did you look at them for serial numbers?

A. Yes, I did.

Q. And did you say anything to Mr. Biswell at that time as to whether or not he should have had these [107] serial numbers designated by the Secretary of Treasury or his delegate?

A. When I explained the process of the prior registration and so forth, I pointed out to him that these firearms also had to be identified by a serial number.

Q. Now, when did this occur?

A. Just—during the explanation period. Mr. Biswell had made inquiries and I explained to him the illegal status of the firearms and told him the different things that you—that a firearm had to be identified by serial number and the barrel length could not be less than sixteen inches on a rifle, and eighteen inches on a shotgun.

Q. And you say this was all done at the same time you picked these guns out of this row of guns in the vault?

A. No, not at the same time. After I advised him of his rights. He had asked several questions and I explained them to him.

Q. This was after you had actually seized the rifles?

A. That is correct.

* * * *

[108] Q. Now, as far as these indictments are concerned, they are based, are they not—for these—four of these—on the fact that there were no serial numbers assigned by the Secretary of the Treasury or his delegate.

And on the fact that these two guns were not registered with the National Firearms Registration and Transfer Record, were they not?

A. That is more or less correct. The possession of firearms, they are not registered to the possessor, and possession of a firearm not with an assigned serial number are separate counts.

Q. So these two things were very important to you at that time, I judge?

A. Pardon?

Q. These violations were important to you at that time?

A. Well, any violation that is discovered is important. The fact that the firearms were not registered to Mr. Biswell was paramount, of course, in importance.

Q. Now, in this report that you made to the U.S. District Attorney, did you make any reference in that [109] report to saying something to Tony Biswell before you seized these guns, or at the time you seized these guns, that they were not registered—or asked him if they were registered?

A. I don't recall. I have my statement here. I can refer to it.

Okay, what was your question, sir?

Q. The question is, did you say—put anything in your statement there to the effect that you had asked Tony Biswell if these guns were registered?

A. No, I don't have it in the statement.

Q. Now, you made a supplemental statement, did you not?

A. Yes, I did.

Q. Would you check that and see if you advised the U.S. Attorney that you made a statement to Mr. Biswell, asking Mr. Biswell whether or not these guns were registered?

A. No, not in the statement.

* * * *

[112] Q. (Mr. Easley continuing.) Mr. Hupp, the indictment here covers the question of the absence of serial numbers from these guns.

Did you find that both of these guns did not have serial numbers?

A. Yes, I did.

Q. In your experience with guns, will you state to the jury whether or not these two guns had serial numbers to begin with?

A. They did not have serial numbers when they were originally manufactured. However, when these firearms were altered into their illegal status, at that time, serial numbers would have been assigned had they been manufactured legally.

Q. And two counts in this indictment have to do with the defendant's failing to obtain serial numbers on these?

A. If you will read that indictment to me. I don't have that completely in my mind.

Q. I will withdraw that, if Your Honor please, I believe that has been stated to the jury.

Now, Mr. Hupp, will you check your report to [113] the United States District Attorney and see if you stated in that report anything regarding a conversation with Tony Biswell as to whether or not he had applied for serial numbers?

A. I don't think my report reflects whether or not I asked him if the weapons had serial numbers.

Q. And is your second, supplemental report, are you saying that it did not contain anything about an inquiry as to serial numbers?

A. Yes, it did not. However, in the normal function of the reports, we have a form 2370 that is forwarded to the national office and also a copy of which is forwarded to the United States Attorney where it describes the weapons and describes it as not having a serial number.

Q. Now, so that the jury won't be confused at all, after your last statement, you made no mention to the United States Attorney about inquiring about this to Tony Biswell?

A. No, either of my two statements to the United States Attorney did I mention that.

Q. Now, I will ask, do you have any recollection of talking with me sometime, let's say, about three weeks ago over the telephone?

A. Yes, I do.

[114] Q. Did you make any notes on that conversation?

A. No, I didn't. Do you have a tape of that telephone conversation?

MR. EASLEY: If the Court please, I do not have a tape.

Q. (Mr. Easley continuing.) Do you recall the gist of the conversation that we had?

A. You asked me to go over the statement and advised me that the United States Attorney had given you clearance to call me and discuss my statement with you, which we did.

Q. And did you give me the contents of those two statements at that time, generally, what was in them?

A. Yes, I did.

Q. I will ask if the first time this question of registration was mentioned, I ask you if you had asked Tony Biswell if these guns were registered.

A. Would you rephrase that?

Q. After you had given me the contents of your statement, I will ask—I will ask if I inquired of you, did you at any time ask Tony Biswell if these guns were registered?

A. Yes, I think I did.

Q. And at that time, do you recall, did you say after a pause, "I believe I asked if they were registered [115] and he didn't know what I was talking about?"

A. That is more or less what I replied.

Q. You didn't arrest him at that time when you seized the guns?

A. No, I didn't.

Q. It was the next day when you came back that you had an arrest warrant and arrested him on the charge?

A. I arrested him at ten-twenty-five a.m. the next day, when he happened to be in the police department, I think conducting some other business.

Q. So, when you seized these guns, they were not seized as an incident of his arrest?

A. They were seized prior to his arrest.

Q. Now, you are talking about the measurements of this rifle that has been identified as Government's Exhibit Number Three.

Will you state how you measured the barrel of that rifle, to the jury, by pointing out all the——

A. At—on this firearm, this is a .22 caliber cleaning rod. All right, I started from the muzzle and brought the tape

down to here (indicating) which is just above the receiver. You can see the chamber, the face of the chamber. You can see that right there (indicating).

Q. Now, are you saying that you measured down [116] to where the cartridge would fit into the muzzle of the gun here, or to the edge of this piece that goes across here?

A. I measured to the face of the chamber.

Q. To the face of the chamber? Now, do you have any kind of measuring device with you?

A. No, I don't.

Q. And you say that the barrel measured, to the point to where you measured, is fifteen and three-quarters inches in length?

A. Within a very small margin.

Q. Do you know of anything in the law that describes the barrel of the gun?

A. Yes.

Q. What law is that?

A. It is in the Gun Control Act of 1968, under definitions.

Q. As to the barrel of the gun?

A. Yes.

Q. And it tells you where to measure it from?

A. To the face of the bolt—of course, now, you are trying to put words in my mouth. I don't recall exactly whether the law states where to measure the firearm from, the barrel.

However, we measure to the face of the bolt.

[117] Now, the barrel, the actual rifle portion, however, we are—it is the policy that this overall concealability of the weapon is brought into effect as far as the barrel length, so you are given the benefit of the doubt of the length of the cartridge.

So in the case of a 30.06, the rifle portion would be much less than it would be in the case of a. 22.

Q. Now, what you are saying is that you don't know of any law that says that you have got to measure this barrel from the face of the bolt, is that correct?

A. No, that is not exactly what I am saying. However, I will be glad to refer to the Gun Control Act, if I will be allowed to.

Q. Very well. Now, let me ask you if you know of any rule or regulation by your department which sets forth where to measure this barrel?

A. As I said, we measure the barrel from the face of the bolt.

Q. But you didn't answer my question, as to whether or not you know there is a rule or regulation.

A. That is we possibly—measure from that—I cannot quote to you the statute, the kind of statute. There are—we are giving you the benefit of the doubt because sometimes you will have a shorter length barrel, the barrel is generally described as a rifle portion—

[118] Q. And where is that defined?

A. In the Gun Control Act.

A. And you are saying that in the rules and regulations, or in the law, there is something there which tells you exactly how to measure these barrels?

A. I wouldn't want to answer that question until I could refer back to the Gun Control Act.

* * * *

[120] REDIRECT EXAMINATION

By MR. RE VEAL:

Q. Mr. Hupp, how long have short guns that you are talking about been described by law?

A. Since early 1930.

Q. Now, when you went into Mr. Biswell's place of business on the fourth of February, was Mr. Biswell cooperative or not?

A. No, he was very uncooperative.

[121] Q. When you told Mr. Biswell you wanted to inspect his stock of weapons, and back into his storeroom, what was Mr. Biswell's response?

A. He wanted to deny me entrance.

Q. Well, what did he do?

A. Well, he said you can't go back there. And I explained to him that it was a licensed premises and it was open to inspection during normal business hours.

And I showed him the section of the law. And at that time he agreed, he said, "If that is the law, I guess it is all right."

* * * *

[139] THOMAS G. HUPP

was recalled as a witness on behalf of the plaintiff, and testified further as follows:

DIRECT EXAMINATION

By MR. RE VEAL:

Q. You are the same Thomas Hupp that testified here yesterday?

A. Yes, sir.

* * * *

Q. (Mr. Re Veal continuing.) Now, referring to February 4, 1970, when you were at Hobbs, New Mexico, at Tonys Loan and Pawn Shop, when you seized the rifles, that we were talking about the other day, what was said, if anything, what was said about the registration of these [140] weapons?

MR. EASLEY: If the Court please, we object to this testimony on the grounds it already has been gone into and Agent Hupp has testified as to what was said.

THE COURT: Well, I'm going to let him testify, if there is something that hasn't been said—of course, I don't want to repeat the part that he testified to yesterday, because that would seem to put undue emphasis on it.

But if there was something else said that wasn't said yesterday, I'm going to let him testify.

Q. (Mr. ReVeal continuing.) All right, Agent Hupp, restrict your testimony, your answer to that question, to things that were discussed between you and Mr. Biswell other than what you talked about yesterday.

A. Well, I explained to him what was required, that the firearms had to be registered, and asked him if they were registered.

* * * *

Q. Was any certificate of registration produced by Mr. Biswell on any of these weapons?

A. No, there was not.

Q. Now, when I say certificate of registration, I mean a certificate from the National Firearms Registration and Transfer Record, specifically. Was such a certificate produced?

[141] A. No, sir.

Q. On either weapon?

A. No, sir.

Q. At that time there was no United States Commissioner in Hobbs?

A. No, there was not.

Q. Was the one in Carlsbad the nearest commissioner?

A. Yes, he was.

Q. And how did you transport Mr. Biswell to Carlsbad?

A. In my government vehicle.

[142] Q. During the course of your transporting Mr. Biswell from Hobbs to Carlsbad, did you have any conversation with Mr. Biswell?

A. Yes, I did.

Q. What was said at that time?

A. Mr. Biswell stated to me that he knew that this was coming, that it was only a matter of time.

CROSS EXAMINATION

* * * *

Q. (Mr. Easley continuing.) What else was said during this conversation with Mr. Biswell in the automobile?

[143] A. He asked me if I knew about a pawn dealer in El Paso who had gotten in trouble with the Federal Bureau of Investigation in regard to some stolen military ammunition.

Q. Did he say anything else more about this case or knowing anything about these two guns being illegal?

A. No. Not that I recall.

Q. Now, you had already been to see at least one other dealer there in Hobbs that morning, had you not, before you came to see Mr. Biswell?

A. That was in the afternoon when I visited the other dealer, just prior to going to Mr. Biswell's place.

Q. You didn't say what dealer that was, do you recall?

A. Yes, I do recall, it was Al's Pawn Shop.

* * * * *

[144] BILL FOWLER

was called as a witness herein on behalf of the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

By MR. RE VEAL:

Q. Would you state your name, please?

A. Bill Fowler.

Q. And where do you live, Mr. Fowler?

A. Hobbs, New Mexico

Q. And by whom are you employed?

A. City of Hobbs, Police Department.

Q. And were you so employed on February 4 and 5 of this year?

A. Yes, sir, I was.

Q. And what is your capacity with the Hobbs Police Department?

A. I am lieutenant in charge of the detective division for the Hobbs Police Department.

Q. On the fourth of February, did you have occasion to go to the place of business of Mr. Biswell?

A. Yes, sir, I did.

Q. Did you go there alone?

A. No, sir, I went with Tom Hupp with A.T. & F.

[145] Q. And in what capacity did you go to Mr. Biswell's pawn shop?

A. I went with Mr. Hupp to make a routine check of the gun law that he enforces.

Q. Well, is it the practice of the Hobbs Police Department to send someone along with an investigator such as Mr. Hupp in the course of his investigation?

A. Yes, sir, it is.

Q. Had you been with him when you went to Al's Pawn Shop that day?

A. Yes, sir, I was.

Q. Did you accompany Mr. Hupp as he went through Mr. Biswell's shop?

A. Yes, sir.

Q. Were you there when—let me ask you if you have ever seen Plaintiff's Exhibit Number One before?

A. Yes, sir.

Q. And where did you see that?

A. I seen this in the back room of Tonys Pawn and Loans in Hobbs, New Mexico.

Q. And on what day was that?

A. February 4, 1970.

Q. Let me ask you if you have ever seen Plaintiff's Exhibit Number Three before?

A. Yes, sir.

[146] Q. And where did you see that?

A. At Tonys Pawn and Loans on February 4, 1970.

Q. Is this when you were there with Agent Hupp?

A. Yes, sir.

Q. Were you there when Agent Hupp picked these things up from the rack?

A. Yes, sir, I was.

Q. Was there a conversation at that time between Agent Hupp and Mr. Biswell with regard to these weapons?

A. Yes, sir.

Q. Would you relate that conversation to your best remembrance, please?

A. When Mr. Hupp picked the first gun up, the shortest .22, he measured it. And he asked Mr. Biswell if he had the gun registered. And Mr. Biswell said, "No," and then there was some conversation about how you would go about registering them and getting a serial number assigned to the gun.

Q. Was there any conversation between Mr. Hupp and Mr. Biswell on the longer of the two weapons that was picked up?

A. Yes, sir.

Q. Would you, to your best recollection, tell us what that was, please?

[147] A. The conversation was in regards to where he had obtained the gun and who from. And Mr. Biswell stated that he had gotten the gun from a Ralph Sias, I believe, was the name.

It was Ralph something, it was a Spanish last name.

Q. Was there any conversation between Mr. Biswell and Mr. Hupp in regards to the registration of Plaintiff's Exhibit Number Three?

A. Not that I recall.

MR. RE VEAL: Your witness.

[148] CROSS EXAMINATION

* * * * *

Q. (Mr. Easley continuing.) I will ask if you were present at all times at Tony Biswell's when Mr. Hupp was doing this talking there about the two guns, after you had gone back into the back room?

A. Yes, sir, I was present during this period of time.

Q. And your recollection now is that what you heard was when Mr. Hupp picked up this short gun and he asked Tony Biswell, "Is it registered?"

A. Yes, sir, after he had measured the gun.

Q. And was this before or after he read this little card to him, telling him what his rights were.

A. It was before.

Q. And your testimony now is that Tony said, "No?"

A. Yes, sir.

• • • •

[149] Q. What else happened back there, if you will tell us, what other questions were asked and what answers were given?

A. I don't recall the exact questions or the answers. I can recall the general conversation.

Q. Relate that to the jury, if you will?

A. The general conversation was when Mr. Hupp asked Mr. Biswell if the gun was registered under the Federal Firearms Act and Mr. Biswell said, "No."

The general conversation was how you went about registering it and getting the certificate.

The reason that I can recall this is because I didn't know you could register a short gun period. I thought that if you had one, it was an illegal weapon without any kind of registration.

• • • •

[150] Q. Now, you have had occasion to be in that storage room before, haven't you?

A. Yes, sir, I have.

Q. And the pawned guns are—Tonys pawned guns and lay-a-way guns are kept in there?

A. It is my understanding that his pawned guns are kept in this room. The room where we picked these [151] two short guns up.

Q. And these two rifles, did you see any evidence there that there been any attempt to conceal them?

A. No, sir, they were in plain view.

• • • •

[155] (Mr. Easley continuing.) Mr. Fowler, to renew my question, did you have occasion to talk to me in the office of Mr. ReVeal and Mr. Watkins yesterday morning?

A. Yes, sir, I did.

Q. And do you recall whether or not they were both present?

A. Yes, sir, they were both present.

Q. And do you recall who else was present, if anyone?

A. Mr. Reynolds.

Q. At that time, this matter was discussed as to what was said about the registration—

A. As I recall it, you asked me to tell you what had taken place in Mr. Biswell's place of business that afternoon of February 4th. And I told you what I recalled.

Q. And on this question of registration, I will ask if you didn't at that time say that Mr. Hupp asked Mr. Biswell, "Is this gun registered?"

And if you didn't answer, "I don't recall what Mr. Biswell said?"

A. I believe that I didn't recall exactly what [156] he said. That it was my impression that he meant, "No" with his answer. But actually, I don't recall the exact terminology, the exact words that were used, no, sir.

Q. But he didn't say "No" as you testified to previously?

A. No, sir, not just—I couldn't say that he said a straight out "NO". No, sir, I couldn't say that.

Q. It could have been that he said he didn't know anything about it?

A. No, sir, my impression was that his answer was "No", but not maybe—not those exact words.

* * * *

[157] JOHN D. SULLIVAN

was called as a witness herein on behalf of the plaintiff, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

By MR. RE VEAL:

Q. Would you state your name, please?

A. John D. Sullivan.

Q. Mr. Sullivan, will you speak into that microphone, please, so that the jury can hear you?

A. What was that?

Q. There is a microphone there, would you try to speak into it so that the jury can hear you a little better.

Mr. Sullivan, where do you live?

A. I live in Hobbs, New Mexico.

Q. And what is your profession?

A. I am an accountant.

Q. As an accountant, do you know Mr. Biswell?

A. Yes, sir.

Q. How long have you known Mr. Biswell?

A. Seventeen years.

Q. And in what capacity have you known Mr. Biswell?

[158] A. Well, I did his book work for him.

Q. You do Mr. Biswell's bookkeeping for him, do you?

A. Yes, sir.

Q. How long have you done the bookkeeping for him?

A. Since 1953.

Q. During the course of your employment by Mr. Biswell, did you have an occasion to discuss with him the Gun Control Act of 1968?

A. I don't think so.

Q. Did you have any occasion to discuss it with him, any of the gun laws?

A. Well, the only thing that I ever did about that was to show him an editorial in the paper.

Q. Now, Mr. Sullivan, before you go on, could you place this discussion or conference you had with Mr. Biswell to some period of time?

About when did this happen?

A. Well, I don't exactly recall, but I imagine it has been about eighteen months ago, maybe.

Q. All right. And you showed Mr. Biswell an editorial in the paper and——

A. Yes, sir.

Q. Do you recall the subject of that editorial?

[159] A. Well, the editorial had reference to this gun law that the Honorable Senator from Montana had put an amendment to. But Tony told me he already knew about it.

MR. RE VEAL: Your witness.

MR. EASLEY: Excuse me a minute, Judge.

We have no questions, Your Honor.

* * * *

MR. EASLEY: If the Court please, we renew our previous motions as to the constitutionality of the statutes permitting the search here of this private storage room under the search and seizure law.

* * * *

[160] THE COURT: All right, the motions will be denied.

* * * * *

LOARN ANTHONY BISWELL

was called as a witness herein on his own behalf, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

* * * *

[164] Q. What is the nature of this pawn shop business? Will you explain to the jury what you do in the pawn business, [165] Mr. Biswell, there in Hobbs? What does it consist of?

A. Well, people, of course, need money. They bring in merchandise and whatever merchandise they bring in, that is a pledge of security for whatever amount of money it will bring normally. And normally all pawns for the State of New Mexico is for a period of thirty days.

And they have any time limits—any time within that period of thirty days to pick up their pledge.

Q. What type of items do you get in?

A. Everything. Everything that has any loanable value to it.

Q. What size place do you have there, Mr. Biswell?

A. My frontage is a hundred and twenty-five foot. Then my depth, I think is a hundred foot, it is rather good sized.

Q. Do you have merchandise in all parts of this building?

A. Oh, yes, I have probably overly stocked for the size of my building.

Q. Is this a volume type business or just infrequent people coming in?

A. Oh, it's rather a large volume of business. You have quite a number of people, a multitude, who—you have your pawns and you have your resale merchandise [166] and, of course, you also have the tape center there and a multitude of younger people come in and buy these tapes, you know, these cartridge tapes that they play in the cars.

Q. Do you purchase new merchandise also?

A. Not too much other than just buy new tapes and a few new guns is what it mostly consists of.

Q. How many people on the average come into your place in a day's time to pawn things to you? Can you estimate?

A. In the pawn only, I would say roughly around twenty-five up to around seventy-five. It more or less depends on the time of the month. Sometimes before payday, of course, there is a lot more. It is kind of a rough estimate there.

Q. And are you busy at—busy all of the time—do you spend full time there at your store?

A. Oh, yes, I am there all of the time. It is very demanding and I almost have to be there other than in the mornings, I have to run into the bank. But that is the only time I leave unless it is an emergency or something and I have to leave.

I eat there and all, I don't leave.

Q. What time do you open up?

A. Eight a.m.

[167] Q. And what time do you close?

A. Seven p.m.

Q. And how many days during the week?

A. Oh, the only day I close is on Christmas day. I am open every day.

Q. Now, do you have anyone else who puts the prices on these pawns as they come in, the loan value?

A. No, I do all of the pricing of the merchandise. Sometimes I might have other girls here make out the tickets, but I do the actual appraising myself.

And also on the repossessed merchandise, if they fail to redeem it, I leave it there for a few more days and then if they don't pick it up, they will pull it out and I price it or I will tell the people how to price it.

Q. Do you have some of that merchandise there that doesn't have any price on it that is in stock?

A. Oh, yes, I have quite a bit of it. I have a multitude, like tools, and as such small miscellaneous type of merchandise, it is impossible to, you know, price every tool. And maybe a large amount of watches, it is almost impossible to price every piece of merchandise that comes and goes.

Q. Do you pawn any guns?

A. Oh, yes, quite a large amount of guns. In that [168] locality, quite a few guns.

Q. What would you say, what would you estimate, the number of guns you pawn in a day or a week? Do you know?

A. Just actual pawn, I would say that I would probably

pawn—just an estimate—I would imagine, around fifty a week.

Q. Did you, let's say, just the last few days, could you give the jury some kind of an estimate in numbers, that you have pawned, if you recall?

A. Yes, I think the day before yesterday I pawned twelve. Of course, actually, there are more guns than that that pass over the counter where you pawn. buy, sell, and trade. It would probably run an average of around eight or ten a day. Of course, it would fluctuate, you know.

Q. Do you have any time to read the newspapers and listen to the radio and so forth?

A. No, I don't take the papers. I don't even listen to the radio. In this tape center, I have got there—of course, we have got these tape players and all of these people can come in and play the tapes. So, about all I hear is just a lot of music, psychedelic music.

Q. When do you do this bail bond business?

A. Well, of course, I keep the pawn shop open [169] twelve hours a day. And normally at night when I close at seven, if I have a bond, I wait until then. If I can, you know. But normally, ninety-nine percent of my bail bond business is done at night, in the evening after I close.

Q. And over what area does you business extend?

A. Anywhere, but normally my bonds are made, my territory covers pretty much Carlsbad, Artesia, Roswell, Lovington, in that general vicinity.

Q. State to the jury about how many hours a day you work on the average?

A. Well, my wife says I work about twenty-four. But I would say about fourteen or sixteen hours a day.

Q. Now, do you know that there has been a Gun Control Act passed by the Congress sometime in 1968?

A. Oh, yes, I have heard a lot of comment on it. A lot of different gun dealers have come in and, of course, they have voiced a strong objection to it. There is just quite a bit of conversation and like that. And I didn't actually read the law.

Q. Did you ever see anyone of these men from the Alcohol, Tobacco, Firearms Division after 1968 up until Mr. Hupp?

A. No, the only one I saw was about five years [170] ago, other than Mr. Hupp, you know.

Q. Did you get anything through the mail in the way of explanation of the Gun Control Act that you know of?

A. I really don't know. I may have. I can't recall.

Q. Did you read anything which gave you the details on the Act in regard to sawed-off rifles?

A. No, sir.

Q. Did you get any rules and regulations that you are aware of that included an explanation that sawed-off rifles were illegal and that they had to be registered?

A. No, I wasn't aware that they were illegal.

Q. Were you aware that there were other illegal weapons that you weren't supposed to handle?

A. Yes, I knew that sawed-off shotguns, a certain length, under eighteen inches, I believe it is, and then, of course, I knew that machine guns——

Q. And where did you get this information?

A. Oh, I knew that when I was a policeman. We always, we was always on the lookout for that, too, you know, and, whenever you saw something—but I don't think any of them was aware that sawed-off rifles were illegal, because it never did come up.

Q. If you received any of this information as to [171] the rules and regulations and the Gun Act, itself, you are unaware of it?

A. I don't know of receiving it. I may have.

Q. What is the manner you handle your mail?

A. I don't really handle my mail—well, sometimes I do. It just depends. But my secretary there, of course, and we get so much junk mail, you know, and advertising, that she just goes through what don't seem important—and, of course, my bills, and you know, my pawn payments, people send in something, she enters all of that in.

Q. You have heard Mr. Sullivan say that some eighteen months ago, which would put it back into '68 sometime, he called your attention to this editorial in the newspaper. Do you have a recollection of that?

A. Not that particular one. Of course, I think we all read different editorials in the newspapers, not the exact law, just comments on it.

Q. Did you know that there was a National Firearms Registration and Transfer Record that short rifles like this was supposed to be registered in?

A. No, sir.

Q. Did you know that if at the time you had these short rifles in your possession, that you should have had a dealer's, a special dealer's license, that you [172] would have had to pay two hundred dollars for?

A. No, sir, I wouldn't have accepted them. I mean, I just didn't realize that there was a law like that. That is a little old single-shot rifle——

Q. Now, Snyder, who testified here, and you heard his testimony, told the jury that he brought this little gun in to you.

Do you recall him bringing it in?

A. Yes, I recall Mr. Snyder bringing in a gun, it looked like that gun.

Q. And is this the gun in your judgment, that Mr. Hupp later took from your back storage room?

A. Well, I would say it is. I don't know.

Q. At the time you took that, did you have any thought at all that you were violating the law?

* * * *

Q. (Mr. Easley continuing.) State what you recall, if anything, about your conversation with Mr. Snyder with regard to this weapon.

A. Oh, no more than any other customer that comes [173] in with a piece of merchandise and they want to pawn it. I don't know whether he said what he wanted, but I told him what I would give him for it. I just made him out a pawn ticket, like I would anything else.

I didn't realize that it was an illegal piece of merchandise. I just pawned it.

Q. Did you make any effort to hide it or conceal it?

A. Oh, no, to me, it is just a gun. Just a little old single-shot gun.

Q. If the Court please, may I call attention to Defendant's Exhibit V and ask if you recognize that piece of paper?

A. Yes, that is my daily report sheet of all of the things pawned that I have to make to the City of Hobbs.

Q. And is this dated—there is an entry here on January 13th?

A. Yes, sir.

MR. EASLEY: If the Court please, we would like to offer this in evidence.

* * * * *

[176] MR. EASLEY: If the Court please, I was asking the witness about Defendant's Exhibit V and at this time, I move that it be introduced into evidence.

THE COURT: All right. It will be admitted.

(THEREUPON, Defendant's Exhibit DV was duly received in evidence.)

Q. (Mr. Easley continuing.) Mr. Biswell, in looking at this Defendant's Exhibit V, is there any indication on there as to the pawning of this rifle by Mr. Snyder?

A. Yes, sir, it is right here, this eight seven nine six.

Q. Now, speak up so the jury can hear you.

A. Yes, it is right here. All of the items are on here numerically numbered and here is the Snyder rifle right here.

Q. Will you point it out to us and indicate where it is on this sheet?

A. It is this one right here. And this rifle right here. And there is the man's complete name, his complete address, his complete social security number, and sex, the date and the time it was pawned.

Q. State what time that is on there.

A. That was at seven p.m.

[177] Q. And is that the time you closed?

A. Yes, but sometimes we can't close quite at seven because we have some business coming in and so we close as soon as we can.

Q. Does this indicate the time that the first pawn was made here on this sheet?

A. Well, every pawn entered on this sheet, this is a record, the first pawn on this sheet was six-ten and the last pawn that day I made was seven p.m.

So, from six-ten to seven p.m., I made thirteen pawns.

Q. That is from six-ten until seven o'clock?

A. Yes, six-ten p.m. until seven p.m., yes.

MR. EASLEY: May I present this to the jury?

THE COURT: Yes, you may do so.

Q. (Mr. Easley continuing.) State whether or not at that

time of the day you are more or less busy than at other times?

A. That is normally my busiest time between six and seven. That is when more of the working force gets off, I guess. And that is when—that's why I stay open later, for that reason, to accommodate them.

Q. Plaintiff's Exhibit Two purports to be a copy of the pawn ticket which Mr. Snyder identified as the one which represents this pawn?

[178] A. Yes, sir.

Q. Did you have the original of that pawn ticket in your possession?

A. Yes, sir, I keep the original on file and I give the copy to the customers.

Q. I hand you what has been marked as Defendant's Exhibit W, and ask if that is the original of the pawn ticket?

A. Yes, sir, that is the original, and that is the copy. I retained this and I gave this to the customer (indicating).

Q. Would you look on the back of that ticket and see if there is some writing there?

A. Yes, sir.

Q. Is that your handwriting?

A. Yes, sir, that is my own handwriting.

Q. And what does it say there?

A. It says "recorded and received as illegal, February 4, 1970."

Q. Thank you, sir.

MR. EASLEY: We move for the introduction of Defendant's Exhibit W, if the Court please.

MR. RE VEAL: No objection, Your Honor.

THE COURT: It will be admitted.

(THEREUPON, Defendant's Exhibit DW was [179] duly received in evidence.)

Q. (Mr. Easley continuing.) At the time Mr. Sills brought the gun into you that has been introduced into evidence, do you have a recollection, an independent recollection, of when that was?

A. The exact date?

Q. Yes.

A. No, sir, not just the recollection of the exact date.

Q. I will hand Plaintiff's Exhibit Three to you and ask you if you recall whether or not that is the gun?

A. Yes, sir.

Q. And how do you identify it?

A. By my handwriting here with his name and the date and the amount on it.

Q. And at the time this gun was seized by Mr. Hupp, he testified he asked you about whose gun this was?

A. Yes, sir.

Q. State what you recall about that conversation?

A. Well, when he picked it up, he just asked me did I have a ticket on it and did I know whose gun this was. And I gave him the information on it, yes, sir.

Q. Does this have a pawn ticket number of some kind on it?

[180] A. It has a person's name, date it was pawned, and also the amount that was owed against it and when he was going to pick it up.

Q. How much does this indicate the pawn was for?

A. The payoff on this is three and a half—you mean the amount it was pawned for or the payoff?

Q. What is on the ticket there?

A. Three and a half.

Q. Relate to the jury if you recall what was said as between you and Mr. Sias when he brought the gun in?

A. No more than any other pawn. He just brought it in and just wanted to borrow some money on it. So, I just made him a loan on it and put his name on it.

Q. Now, did you fill out a pawn ticket yourself, do you know?

A. No, sir, sometimes when we are so busy at the counter, I only work out of one pawn book because they are all numbered, and so I have to go in numerical order.

And sometimes if we are real busy, I have sometimes one of the girls make the pawn ticket, I just take the person's name and the information on it and just stick it on the merchandise and give him a little ticket. [181] And when she gets caught up, I go and make out the regular ticket.

Q. Did you have any record on this gun other than the name on the butt as far as you know?

A. I don't believe I did, that I know of, no, sir.

Q. At that time, did you make any effort to conceal the gun or did you consider it as an illegal weapon?

MR. RE VEAL: Your Honor, I will object to this as being leading.

THE COURT: Yes, objection is sustained.

Q. (Mr. Easley continuing.) Do you know who placed the gun back in the storage room?

A. Yes, I have a boy working for me that does all of the relaying of the merchandise back and forth. He takes care of all of my stock and inventory in pawn in my private storeroom, you know. That stuff is left there by the customers.

Q. And do you know—do you have any independent recollection as to whether or not he took the gun back to storage?

A. I don't know for sure. Now, I have another boy that works for me and he also assists in the storage. One guy, he is pretty much hired for the job, and the other [182] guy helps him out when he gets crowded, you know, gets busy.

Q. Was there anything said at any time when Mr. Sias came in there about the registration of the firearm?

A. No, sir.

Q. And was there anything said about a serial number on the firearm, on that firearm?

A. No, sir.

Q. Now, you heard Mr. Hupp testify here, Mr. Biswell, that when you went back to the back of the building, that he found these short guns.

If the Court please—I am going to hand you Defendant's Exhibit M, and will you tell us what that portrays?

A. That is one of my main storerooms. This is my private storeroom of all of the merchandise that are in pawn. And, of course, it is not there for display, because it is not for sale, it is all these pawns.

Q. And is this area where the guns were indicated, is that where you keep some of the guns in pawn?

A. Yes, that is not all of them, but that is part of them in that area.

Q. I will hand you Defendant's Exhibit N and ask if you recognize that?

A. Yes, that is the other half of this here which [183] all consists of one big storeroom, where I keep all of the pawn stuff.

Q. Would you stand down here just a moment, Mr. Bis-

well. On the right-hand side——

MR. RE VEAL: If Your Honor please, could we have these offered?

MR. EASLEY: If the Court please, we will offer these in evidence.

THE COURT: All right, is there any objection?

MR. RE VEAL: No, we have no objection.

THE COURT: They will be admitted.

(THEREUPON, Defendant's Exhibits Numbers M and N were duly received in evidence.)

Q. (Mr. Easley continuing.) I will call your attention to some coke cases here on the right-hand side of the—Defendant's Exhibit M—and on the left-hand side of Defendant's Exhibit N, and ask if those are the same coke bottles, indicating two separate pictures of one wall?

A. Yes, sir, this is all one wall, one wall and one part of the storage room, yes, sir.

Q. Now, I call your attention to the right-hand side of exhibit N, and ask what were—where the door is leading out to the front?

A. There is a large door right here, it's a door [184] approximately this wide (indicating) that goes into another storeroom for just about ten foot and then you go into the front part of the building.

Q. Now, you are pointing to the right-hand side of exhibit N as to where the entrance door is?

A. Yes, you can vaguely see the door right here but the door, of course, is actually about four or five foot wide and——

Q. Now, while you were on your feet, Mr. Biswell, let's call attention to Defendant's Exhibit K, which has already been introduced into evidence and how does that picture fit into these two?

A. Well, you can actually see this piece of wood right here, which is this piece of wood, but here is my big piece of—doorway—and right here is the entrance right here to that and, of course, you just go up into here and then you go into my front, my front place of business.

All of this space is storage area.

MR. EASLEY: If the Court please, I would like to offer into evidence Defendant's Exhibit P, also.

THE COURT: Any objection?

MR. RE VEAL: No objection.

THE COURT: It will be admitted.

(THEREUPON, Defendant's Exhibit P was duly [185] received in evidence.)

Q. (Mr. Easley continuing.) I call your attention to Defendant's Exhibit P and ask what that represents there.

A. Well, that is just the left side of the wall you saw the guns—this is just the left side just like—it is a long room and this is this side and all of the guns are up and down that side (indicating).

Q. So that is the left-hand side of the door?

A. Yes, sir.

Q. And state what those objects are stacked against the wall.

A. All of these guns and cases—all of these are guns in cases. Now, I separate the guns in the cases over from the guns that are not in cases. It gives you a little bit more space in recovering the merchandise.

So I keep them separated that way. They are all right here in plain view. This is all pawned merchandise (indicating).

Q. You may take the stand, there.

Do you have any idea as to how many guns that you have taken into pawn in the last, say, two years?

A. No, it is quite a multitude. I couldn't give you the exact figure, it's quite a large amount.

[186] Q. Now, Mr. Hupp said that this short rifle was just inside that door, or strike that, if the Court please.

I want to ask you one other question.

Judging from the number of guns that are in this picture, state whether or not you usually have that many guns or, or more or less?

A. Oh, I have at least that many at all times. A lot of times more. Of course, that is just my rifles, that is not my hand guns.

Q. How many hand guns would you say you normally have in pawn?

A. Gee, I would say—I can only give you a rough figure. I would say at least around two hundred.

Q. Now, when Mr. Hupp picked up this short rifle, let's

hear what you have to say about what transpired after that. Tell the jury what happened as far as you can remember?

A. He went back in the back room and [redacted] walked down in the area here and the short guns were along with all of the rest of those guns you see there. And they were sitting there kind of by the door and he immediately grabbed the gun up.

And then he pulled a little celluloid card out of his pocket and he read me some type of rights out of this card there. And then he asked me if I had a sheet [187] or slip on this gun. And I said, yes. So I checked the number of the gun. I went back up in front and I got my pawn tickets and then my daily sheet and then I showed him my records I had on the gun.

I think he took down the numbers and address. I am not for sure.

Q. Now, what else was said there? Just tell the jury what took place.

A. Well, he picked up the gun. He seemed rather surprised, or something. He picked the gun up and then he asked me, "Are you aware of the fact that this gun is illegal?"

And I said, "No, I am not."

And then he read me that right deal, and that is all I remember that he asked me other than if I had the sheets on it or papers on it.

And, of course, I assumed when he said papers that the bill of sale is—the pawn ticket I had made on the gun.

Q. I asked you, do you recall him saying anything about registration of the gun?

A. No, sir, I don't. If he said registration, I assume he meant this pawn ticket. I don't recall him saying that. I just recall him asking me if I had the papers on the gun. And, of course, by that I assumed he meant the [188] pawn tickets.

Q. And what transpired when he picked up the other gun belonging to Mr. Sias?

A. Well, of course, when he got that one—I don't recall —in—I think that him and Mr. Fowler, they said something probably among themselves, and then he went on after all of this transpired.

And then he went on and he found this other gun. And he also asked me the same thing, if I had the papers and all on this gun.

And I said, "Yes, I have the pawn tickets and whatever is needed on it."

But he didn't ask me if I was aware that the gun was illegal because I wasn't. They were just there with all of the guns, you know.

Q. Did he say anything to you about having a license to handle these destructive devices at any time while he was there?

A. He asked me if I had a license. And I showed him the license that I had, the regular firearms license. But he didn't, knowingly, ask me about a license to handle gangster weapons, and destructive items or whatever that code reads there.

Q. When did he inquire as to your regular firearms license? Was this before or after he saw the [189] short guns?

A. It was before.

Q. This was before he went in to the storage room?

A. Yes, sir.

Q. And after he went into the storage room, did he at any time, ask about any kind of license?

A. Not this big—this registration license, no, sir, not that I recall.

Q. At any time did he say anything to you about whether or not you had serial numbers assigned to these guns?

A. I don't recall just exactly. Not knowingly, did he ask me. I don't know what you mean by assigned, now. A lot of guns have serial numbers but they are put on by the manufacturer.

Q. Did he ever tell you or ask you anything about the Secretary of the Treasury or his delegate assigning serial numbers to those guns?

A. No, sir, I don't remember that.

Q. Did you take these guns knowing that a serial number must have been assigned to them by the Secretary of the Treasury or his designated officials?

A. Oh, no, sir.

Q. Did you take them and possess them knowing that

[190] you had to have a special license for handling that type of weapon?

A. No, sir, I did not.

Q. And did you take them knowing that a serial number must be assigned to them, by them?

A. No, sir, I did not.

Q. Did you have any intent or knowledge to disobey the law in handling these weapons?

A. No, sir, no, siree.

MR. EASLEY: Pardon me just a minute, Judge.

If the Court please, one other picture that I overlooked that we didn't bring in the courtroom, if the Court would indulge us just a moment.

THE COURT: All right.

MR. EASLEY: If the Court please, I would like to offer into evidence Defendant's Exhibit A.

THE COURT: Any objection?

MR. RE VEAL: No objection, Your Honor.

THE COURT: It will be admitted.

(THEREUPON, Defendant's Exhibit A was duly received in evidence.)

Q. (Mr. Easley continuing.) Mr. Biswell, I will ask if you recognize that picture as—designated as Defendant's Exhibit A?

A. Yes, sir, that is about half of my loan [191] company there, one side of it, yes, sir.

Q. Which side is that?

A. That is the west side of my loan company. Here is my front door, right along here (indicating).

Q. You are pointing to the left side of exhibit A as your front door?

A. Yes; sir, this is my front door that goes to the outside of my business.

Q. Now, state where the door that you indicated was on the right goes?

A. It goes—that door says "no admittance, employees only", that is my private storeroom where I keep all of my pawned merchandise.

MR. EASLEY: Very well, pass the witness, Your Honor.

THE COURT: All right, you may cross examine.

CROSS EXAMINATION

By MR. RE VEAL:

Q. Mr. Biswell, did you on February 4, 1970, have a license to do business, to deal in sawed-off rifles, short rifles, or short shotguns? Had you obtained a license from the Secretary of Treasury?

A. No, sir.

[192] Q. Had you, in fact, paid the special occupational tax of two hundred dollars to the Secretary of Treasury or his delegate in order to obtain such a license?

A. No, sir.

Q. Had you applied for such a license?

A. No, sir.

Q. Have you, at any time, ever had such a license?

A. No, sir.

Q. Do you have one today?

A. No, sir.

Q. With regard to the rifle pawned to you by Mr. Snyder, that would be the shorter of the two of the ones we are talking about, I believe. Have you, yourself, registered that weapon with the National Firearms Registration and Transfer Record?

A. You say did I?

Q. Yes, have you?

A. No, sir.

Q. Have you ever done that?

A. No, sir.

Q. Have you ever applied to the Secretary of Treasury for a serial number for that weapon?

A. No, sir.

[193] Q. With regard to the rifle pawned to you by Mr. Sias, the longer of the two rifles we are talking about, Plaintiff's Exhibit Three, have you ever registered that weapon with the National Firearms Registration and Transfer Record?

A. No, sir.

Q. Have you ever applied to do so?

A. No, sir.

Q. Have you ever applied to register the Plaintiff's Exhibit One, the Snyder weapon?

A. No, sir.

Q. Have you ever applied to the Secretary of the Treasury or his delegates for a serial number for the Sias weapon?

A. No, sir.

Q. Plaintiff's Exhibit Three?

A. No, sir.

Q. How long have you had a pawn shop in Hobbs?

A. Approximately about twelve years.

Q. And prior to that time, were you a policeman with the police department?

A. Yes, five years.

Q. And during the course of your duties as a policeman with the Hobbs Police Department, I believe you testified you had an occasion to look for and be aware of [194] illegal weapons?

A. Yes, sir, sawed-off shotguns and machine guns, yes, sir.

Q. And during that time, have you—you said you obtained—did you obtain any training with regard to illegal weapons in the course of your in-service training?

A. We didn't have any type of school or anything. At that time, they didn't conduct the schools. You know, it was in among the officers, there.

Q. And so you had discussion among the officers about illegal weapons, is that correct?

A. Yes, sir.

Q. And these included sawed-off rifles as well as sawed-off shotguns?

A. What was your question?

Q. I said, didn't these discussions include sawed-off rifles as well as sawed-off shotguns? Did they not?

A. No, sir, I wasn't aware of the sawed-off rifles, that they were illegal.

* * * *

Q. About how many employees do you have working in your pawn shop?

A. Let's see, now, three.

Q. Well, in February of 1970, how many did you have?

A. Three.

Q. And I believe it was January when Mr. Snyder

pawned the shorter of the two weapons, January 13th, as I recall. How many employees did you have?

A. Well, when I say employees, I am including myself, I have another guy and a girl and myself.

Q. And your wife works there too, does she not?

A. Occasionally, yes.

[196] Q. Now, you stated that in the course of your regular business as a pawn shop operator, you took these two weapons in pawn, did you not?

A. Yes, sir.

Q. Now, how many weapons do you pawn every week, do you take into pawn weekly, I mean, hand guns, rifles, shotguns?

A. I gave an estimate a while ago of approximately fifty a week. But it is just an approximate figure.

Q. And how long have you been pawning weapons at that rate?

A. Well, my business has gradually been improving. My records—it has increased a little every year, yes, sir.

Q. How many of these weapons do you return every week?

A. That is redeemed?

Q. Yes.

A. Normally on guns, I'd say a hundred, I am just quoting a figure, I would say probably sixty to seventy-five percent of them are redeemed.

Q. So, if you take in fifty a week, you would return about thirty, or fifty percent of fifty?

A. Probably thirty or forty, maybe a few more. It would depend.

* * * *

[198] Q. Well, now, with regard to this rifle pawned by Mr. Sias, Plaintiff's Exhibit Number Three, do you recall what time of day it was that rifle was pawned?

A. I believe in the afternoon, yes.

Q. Would it have been after six o'clock in the evening?

A. I don't believe it was that late.

Q. So it wasn't during the busiest part of your day, was it?

A. It's hard to say, really, when the busiest time of the day is.

Q. Well, you said earlier it was between six and seven, the busiest part of your day?

A. On my pawns, but not on my retail, there is a fluctuation on that.

Q. Well, when Mr. Sias pawned this weapon, what did you do with it?

A. Like I do all merchandise, everything is pawned. I have my counter, say, this is the pawn counter (indicating) and all of my pawned merchandise, after it is pawned, I set it down here by the counter. Then my stock boy, he picks it up and puts it back, and sets it on shelves that is designated for that type of [199] merchandise.

* * * * *

Q. Well, when Mr. Hupp came into your place of business, he asked to go into your back room. Why didn't you let him go?

A. Well, your back room, of course, is your [200] personal storeroom, and, of course, I was under the opinion that no one has any authority to go back there unless they have the proper papers or permission or search warrant or whatever is necessary, because that is all items that are pawned.

That pertains to all other law enforcement officers. I just assumed it pertained to all of them.

Q. Well, officer, or the Hobbs Police Officer Fowler, he testified he had been in your place of business before and had been back in the storeroom before, hadn't he?

A. Yes, sir.

Q. Did he have a search warrant to go back there each time?

A. No, no, sometimes it was voluntary and sometimes it wasn't.

Q. But you decided not to let Hupp go back there until he could show you some authority, is that correct?

A. No, I didn't decide, I just didn't really realize just what the law was on it.

Q. Well, you heard about the new Gun Control Act of 1968, haven't you, prior to the time we are talking about?

A. I heard that there was a law, yes.

[201] Q. And you are telling the jury here today after

being a police officer for five years and after having been a licensed dealer to handle multi-type firearms for over twelve years, that you made no inquiry or attempt to find out what the new law was and what you were required to do under that law?

A. It is a rather confusing law.

Q. Would you answer the question, please?

A. I didn't read the law. I mean, I didn't read it word for word. I had made a few inquiries from some other dealers and all.

Q. Had you ever had a copy of that law in your possession?

A. I don't recall.

Q. Isn't it a fact that as a dealer you were mailed a copy of the law and a copy of the regulations under it?

A. I don't know if I actually received a copy of it or not. I may have or I may haven't. I couldn't testify one way or the other about it.

Q. But you made no effort to find what the law even though you were a dealer in firearms?

A. Well, I tried to abide by the law.

Q. Well, what effort did you make to find out what the new law was all about?

[202] A. Pardon me?

Q. What effort did you make to find out what the new law was all about?

A. Well, I had discussed it with other gun dealers, occasionally, the topic comes up. How the law varies and how it was changing and everybody seemed rather confused about it. We have all done what we have tried to do, what we have thought was best.

Q. But you didn't contact the Internal Revenue Service or contact your lawyers to find out what the law was all about, did you?

A. Not personally contact them. I just figured they would come around and tell me and instruct me how it should be done more—how it should be done.

Q. As a matter of fact, the area of the law with respect to sawed-off rifles has been the same since 1930, hasn't it?

A. Not that I know of. I wasn't aware of that. I didn't know that.

[213] Q. (Mr. Easley continuing.) Mr. Biswell, you are the same Tony Biswell that was on the stand previously?

A. Yes, sir.

Q. And you have been sworn?

A. Yes, sir.

Q. You heard Agent Hupp make a statement that on the way to Carlsbad, he heard you make the statement to [214] him—something to the effect that you knew that this was coming sooner or later?

A. Yes, sir.

Q. Did you make such a statement to Mr. Hupp?

A. Yes, sir.

Q. And will you state to the Court and jury what you had reference to when you made such a statement?

A. Yes, sir, I knew he had been in town previously. I don't know that day or nothing. And the different other pawn shops and gun dealers had told me he was around making periodical inspections and he was going to inspect all of the gun dealers and pawn shops. So I knew he was going to be by my place, you know, also along with the rest of the other gun dealers to make the routine inspection.

MR. EASLEY: That's all.

THE COURT: Any cross?

CROSS EXAMINATION

By MR. RE VEAL:

Mr. Biswell, as I understand it, this statement that you made was made after you had been packed up at the police department, is that right?

A. At the judge's office, sir. It wasn't at the police department.

[215] Q. So, you didn't make that when he came into the store, but you rather made that after you had been arrested?

A. In route to Carlsbad, yes, sir.

Q. So, isn't it a fact that you made it with reference to that which had finally happened?

A. No, it was made in regard that I knew he was going to come by and make a routine check, that's all.

SUPREME COURT OF THE UNITED STATES

No. ------, October Term, 1970

UNITED STATES,
Petitioner,

v.

LOARN A. BISWELL

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 17, 1971.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 9th day of June, 1971

SUPREME COURT OF THE UNITED STATES

No. 71-81 ------,

UNITED STATES,
Petitioner,

v.

LOARN ANTHONY BISWELL

ORDER ALLOWING CERTIORARI. Filed ------ December 7, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth ------. Circuit is granted.

☆ U. S. Government Printing Office: 1972—453-520/403